THE FOURTH AMENDMENT FUNCTION OF THE GRAND JURY

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I. THE PROBLEM

The grand jury, with antecedents predating the petit jury,[1] remains an integral part of American criminal justice machinery despite more than one hundred and fifty years of severe criticism and occasional abolition movements.[2] It is preserved as an institution of government by the fifth amendment, which requires prosecution by grand jury indictment in all felony cases punishable by death or imprisonment for a term exceeding one year.[3] While this clause is applicable only to federal criminal prosecutions and is not binding upon the states by way of the fourteenth amendment,[4] the grand jury process continues to be an essential component of state criminal procedure. More than half of the states currently require prosecution of all felonies by grand jury indictment,[5] and even those states that permit felony prosecution by a prosecutor's information have not abolished the grand jury system. In these states, without exception, local prosecutors may charge major offenses by either grand jury indictment or information.[6] There is at present no significant movement to amend the fifth amendment nor to eliminate the grand jury process in state criminal prosecutions.[7] Since use of the grand jury

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[1] For a history of the grand jury see L. CLARK, THE GRAND JURY (1975); G. EDWARDS, THE GRAND JURY (1906); R. YOUNGER, THE PEOPLE'S PANEL (1963). *See also* text accompanying notes 67-85 *infra*.

[2] *Id. See* note 104 *infra*.

[3] The fifth amendment provides in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." The term "infamous crime" is construed to mean any offense punishable by imprisonment for a term exceeding one year or at hard labor. FED. R. CRIM. P. 7(a).

[4] Hurtado v. California, 110 U.S. 516 (1884). By the time *Hurtado* was decided a number of states already had removed from their constitution the mandatory requirement of prosecution by indictment. *See* note 104 *infra*.

[5] *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 865 (4th ed. 1974) [hereinafter cited as KAMISAR]. For a survey of state requirements see Spain, *The Grand Jury, Past and Present: A Survey*, 2 AM. CRIM. L.Q. 119, 126-42 (1964).

[6] *Id.* In virtually all cases the decision to use the information or the indictment rests in the discretion of the prosecutor, since it is the prosecutor who controls the events within the grand jury room. *See* note 91 *infra*. In rare instances a "runaway" grand jury might insist upon returning an indictment against a person whom the prosecutor would not charge with any offense.

[7] The grand jury remains a useful political tool of the prosecuting attorney. By submitting a case to the grand jury instead of proceeding by information, the prosecutor can create the impression that the decision to prosecute, or not to prosecute as the case may be, is solely that

offers the prosecution significant benefits that are not otherwise available, any abolition effort may expect serious opposition. It is safe to assume that grand juries will be with us for some time to come.[8]

There are many statements in the cases and commentary celebrating the claimed historic purpose and function of the grand jury as the protector of the innocent from oppressive governmental prosecution.[9] But the grand jury remains, as it has always been, the accusatorial arm of the executive.[10] Its real purpose is "to decide whether or not there is sufficient evidence to justify the standing of trial."[11]

In most jurisdictions today, the standard for determining whether the evidence is sufficient to justify putting the accused to trial is stated either in terms of probable cause or a prima facie case. The grand jury may be instructed that an indictment should be returned only if there is probable cause to believe the accused is guilty of the offense: "And probable cause exists only when there is competent evidence, direct or circumstantial, before you which leads you, as reasonable persons, to believe that the defendant is guilty of the offense charged."[12] Or the jury may be told that the state must show a prima facie case before an indictment is justified:

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of the grand jury. In addition, effective use of the grand jury may help to create a public image of the prosecutor as an anticrime crusader. For these reasons, and others, few prosecutors indorse the abolition movement. In addition, few defense lawyers and civil libertarians urge abolition of the federal grand jury since it would require repeal or modification of the fifth amendment, an event that could create a dangerous precedent and imperil the self-incrimination clause as well as other constitutional freedoms. A safer approach is to urge statutory reform of the grand jury process. *See, e.g.*, L. CLARK, *supra* note 1, at 124-45 (1975).

At the state level, proposals for reform come as suggestions for modification rather than elimination of the grand jury. *See, e.g., Major Changes Urged in Grand Jury System*, Columbus Dispatch, Sept. 29, 1976, § A at 8 (report of the Ohio Constitutional Review Commission committee on the grand jury).

[8] "In the light of our federal constitutional guarantee, suggestions for its abolition are somewhat visionary." 8 MOORE'S FEDERAL PRACTICE ¶ 6.02[1][a], at 6-11 (2d ed. 1976).

[9] Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

Wood v. Georgia, 370 U.S. 375, 390 (1962).

[10] For discussion of the origin and history of the grand jury as an arm of the executive branch see G. EDWARDS, *supra* note 1, at 2.

[11] L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 144-45 (1947). Of course, it may be fair to say that the protective function is subsumed within the accusatorial function—*i.e.*, the grand jury, if it performs properly, will protect the innocent from oppressive prosecution by its very decision as to whether there is sufficient evidence to justify a trial. Nonetheless, the grand jury was not conceived as a protective institution and is regarded by few as such today.

[12] Yankwich, J., *Charge to Grand Jury*, 16 F.R.D. 93, 94 (1955).

> If there is inadequate evidence to prove that defendant committed the crime, the jurors should vote against indictment. The evidence before them is usually only the government's case and if this will not, although uncontradicted, prove defendant guilty he should not be indicted at all.[13]

In either case, when an indictment is returned by the grand jury, the consequences extend beyond merely deciding that the subject of the inquiry should be accused of a crime. The decision to indict carries with it significant and often unrecognized fourth amendment implications. If the accused is not under arrest at the time of indictment, an arrest warrant is issued by the court without further judicial inquiry into probable cause.[14] Or, if the defendant has been arrested and is in custody or released on bail, the indictment itself precludes further inquiry into the legal cause justifying further detention or continued conditions of release.[15] Thus the decision to indict operates as a fourth amendment probable cause determination to arrest or detain in custody;[16] it is the decision of the grand jury rather than a magistrate which leads to detention. Sanctioned by tradition and custom, the grand jury exercises this fourth amendment function in virtually all American jurisdictions. Nonetheless, analysis of relatively recent developments in the fourth amendment and grand jury areas suggests that it is time to reconsider the fourth amendment function of the grand jury. The Supreme Court has yet to address directly the question of whether the procedure is constitutionally acceptable.

A somewhat parallel question was raised in *Gerstein v. Pugh*,[17] in which the issue was whether the filing of a prosecutor's information alone could be a legal basis for detaining an accused prior to trial. Under the Florida procedure, a prosecuting attorney could charge Any noncapital offense by information without any prior probable cause hearing, and the filing of an information foreclosed any right to a subsequent probable cause hearing.[18] In operation, the effect of the procedure was that the accused could be arrested and detained in

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[13] Fletcher, J., *Charge to a Grand Jury*, 18 F.R.D. 211, 215 (1956).

[14] *See, e.g.*, FED. R. CRIM. P. 9(a): "Upon the request of the attorney for the government the court shall issue a warrant for each defendant named . . . in the indictment."

[15] This policy is reflected by the traditional rule that the return of an indictment forecloses the defendant's right to a preliminary hearing. *See, e.g.*, FED. R. CRIM. P. 5(c); OHIO R. CRIM. P. 5(B). Michigan is perhaps the only jurisdiction which provides for a preliminary examination *after* indictment. *See* People v. Duncan, 388 Mich. 489, 201 N.W.2d 629 (1972).

[16] U.S. CONST. amend. IV: "[A]nd no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ."

[17] 420 U.S. 103 (1975).

[18] *Id.* at 105-06.

custody for a period of more than a month before arraignment, the first appearance before a judge at which the issue of probable cause could be raised.[19] There was no point in the process at which the prosecuting attorney was required to show probable cause to justify the arrest and detention.[20] The Court unanimously found the Florida procedure constitutionally deficient under established fourth amendment principles requiring that the accused be afforded "a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."[21] Moreover, the probable cause decision must be made by a neutral and detached magistrate; the prosecuting attorney's decision to file an information could not serve as a probable cause determination because "a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate."[22] Accordingly, the Court concluded that when an information is filed, the accused must be afforded a "fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest."[23]

Should not the same principles govern when the accused is charged by grand jury indictment? Should not there be a probable cause determination by a neutral and detached magistrate to justify arrest or detention following indictment? Unless the grand jury process itself is structured to preserve the fourth amendment values served by a neutral and detached magistrate, the *Pugh* rationale should require an independent probable cause decision in every case, whether instituted by a prosecutor's information or a grand jury indictment.

Although these questions were not at issue in *Pugh,* Mr. Justice Powell, writing for the Court, volunteered in a footnote the view that a person charged by indictment would not be entitled to a probable

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[19] *Id.* at 106. Whether it could be raised at arraignment under Florida procedures was unclear, but the Fifth Circuit had "assumed, without deciding, that this was true." *Id.* at 106 n.4.

[20] Even when an information is verified, it rarely contains facts sufficient to establish probable cause in the fourth amendment sense. The information is a formal charge, usually drafted in the language of the penal statute, and contains little more than allegations of the essential elements of the crime charged. It is required only to meet the sixth amendment demand that the accused "be informed of the nature and cause of the accusation." *Cf.* Russell v. United States, 369 U.S. 749, 763-64 (1962). Different factual allegations are required to justify a search or seizure under the fourth amendment. *See* text accompanying notes 133-44 *infra*; Kinnaird v. State, 251 Ind. 506, 242 N.E.2d 500 (1968).

[21] 420 U.S. at 114.

[22] *Id.* at 117.

[23] *Id.* at 125.

cause determination because the grand jury itself is an acceptable substitute for a neutral and detached magistrate:

> By contrast, the Court has held that an indictment, "fair upon its face," and returned by a "properly constituted grand jury," conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. . . . The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution.[24]

The language of the footnote is not without some prior judicial support. In *Ex parte United States*,[25] the district judge refused to issue an arrest warrant upon the return of an indictment, claiming only that the issuance of a warrant is a "matter . . . within the judicial discretion of the court."[26] Without distinguishing the concept of probable cause to indict from that of probable cause to arrest, the Court, by mandamus, ordered the district judge to issue the warrant.[27] Observing that the refusal to issue a warrant may in practical effect frustrate the prosecution since the defendant could not be tried *in absentia*, the Court concluded:

> The question whether there was probable cause for putting the accused on trial was for the grand jury to determine, and the indictment being fair on its face, the court to which it was returned, upon the application of the United States attorney, should have issued the warrant as a matter of course. . . .
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> . . .[T]he finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer.[28]

However, the decision in *Ex parte United States* does not provide conclusive support for Mr. Justice Powell's fourth amendment theory, since it was not decided on fourth amendment grounds.[29] The district judge did not claim that the warrant should not issue because

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[24] *Id.* at 117 n.19 (citations omitted).

[25] 287 U.S. 241 (1932).

[26] *Id.* at 245.

[27] It should be noted that the Court in *Pugh* suggests strongly that the two probable cause standards are not identical. A person may be charged with an offense on less than fourth amendment probable cause so long as he suffers no restraint on liberty more severe than the requirement of appearing for trial. *See* text accompanying notes 34-39 *infra*.

[28] 287 U.S. at 249-50.

[29] Indeed the decision is not cast in any constitutional terms; moreover, the Court has never held that to be indicted by a grand jury on less than probable cause is a violation of the defendant's right under the fifth amendment.

the grand jury lacked sufficient evidence before it to establish probable cause to arrest. His only justification was that the decision to issue a warrant was within his judicial discretion. With no discussion of the relationship of the fourth amendment to the grand jury process, the Court merely held that a district judge is without discretion to withhold a warrant when an indictment is returned by "a properly constituted grand jury."[30]

Later, in *Giordenello v. United States*,[31] the Court did discuss in dictum the fourth amendment-grand jury relationship. Finding a complaint insufficient on its face to establish fourth amendment probable cause for the issuance of an arrest warrant, the Court suggested that when a grand jury finds probable cause to indict, ipso facto it has found probable cause for arrest.[32] Mr. Justice Powell's footnote in *Pugh* cites and relies upon both *Ex parte United States* and *Giordenello*.[33]

The footnote and cases cited in support are consistent with established constitutional principles only if probable cause to indict is an evidentiary standard that is equal to, or greater than, probable cause to arrest and detain under the fourth amendment. If it is permissible to indict on evidence that is less than would be required to arrest and detain, then there is a clear fourth amendment violation constructed into the rationale of the footnote and the language of *Ex parte United States* and *Giordenello*. While the Court has left undecided the distinctions, if any, between probable cause to indict and fourth amendment probable cause, it did touch upon the issues in *Pugh*. The Court carefully noted that the absence of a probable cause determination affected only the validity of the restraint on liberty and did not invalidate the information that was filed.[34] Thus, in the absence of a probable cause determination, the accused is entitled to be released from custody, but is not entitled to dismissal of the charge. The probable cause determination is "required only for those suspects who suffer restraints on liberty other than the condition that they

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[30] 287 U.S. at 250.

[31] 357 U.S. 480 (1958).

[32] It does not avail the Government to argue that because a warrant of arrest may be issued as of course upon an indictment, this complaint was adequate since its allegations would suffice for an indictment under Federal Rule of Criminal Procedure 7(c). A warrant of arrest can be based upon an indictment because the grand jury's determination that probable cause existed for the indictment also establishes that element for the purpose of issuing a warrant for the apprehension of the person so charged.

Id. at 487.

[33] 420 U.S. at 117 n.19.

[34] *Id.* at 119.

appear for trial."[35] The fourth amendment probable cause determination "is not a constitutional prerequisite to the charging decision."[36] Unless a higher standard is imposed upon grand jury indictments than upon prosecutors' informations, the rationale of *Pugh* recognizes a qualitatively different standard for the charging decision than is required for the fourth amendment determination. Accordingly, a grand jury indictment should raise no presumption, conclusive or otherwise, of probable cause to arrest and detain. Moreover, even if the same evidentiary standard were required to be met for indictment, the grand jury would not be an acceptable substitute for a fourth amendment magistrate.

II. THE FOURTH AMENDMENT MAGISTRATE

Pugh recognized the established rule that the fourth amendment requires a probable cause decision by a neutral and detached magistrate.[37] To accept the proposition that an indictment "fair upon its face" and returned by a "properly constituted grand jury" conclusively determines the existence of probable cause and requires the issuance of an arrest warrant without further inquiry,[38] one must conclude that a grand jury possesses those characteristics required of a neutral and detached magistrate. In Justice Powell's view, "[t]he willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution."[39] But more is required of a neutral and detached magistrate than a historical role of protecting the innocent from oppressive prosecution. More than once the Court has been called upon to describe the essential qualities of a fourth amendment magistrate, and in light of its decisions it clearly is improper to

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[35] *Id.* at 125 n.26.

[36] *Id.*

[37] "To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible." 420 U.S. at 112. Although an arrest may be made by a police officer on the street, the fourth amendment requires a determination of probable cause by a neutral and detached magistrate "as a prerequisite to extended restraint of liberty following arrest." *Id.* at 114.

[38] *Id.* at 117 n.19.

[39] *Id.* Cited in support of this conclusion is the case of United States v. Calandra, 414 U.S. 338 (1974). At issue in *Calandra* was whether a witness summoned before a grand jury may refuse to answer questions on the ground that the questions are the product of an unlawful search and seizure. While the case contains language praising the grand jury as the protector of the innocent, it does not discuss the question of whether the grand jury is an adequate substitute for a neutral and detached magistrate. Although Justice Powell is the author of the majority opinion in *Calandra*, his reliance on that case in *Pugh* may be misplaced.

entrust the fourth amendment function to the grand jury.

The core of the decision in *Pugh* is the reaffirmance of the established fourth amendment principle that the prosecuting attorney cannot serve the function of a fourth amendment magistrate. The Constitution requires that the probable cause decision to arrest be made by a neutral and detached magistrate independent of police and prosecution.[40] Since, under the Florida procedure, the decision to charge by information was solely within the discretion of the prosecuting attorney, and the filing of an information resulted in the arrest or continued detention of the accused, the system in effect invested the prosecuting attorney with the power to determine fourth amendment probable cause. With ample precedent, the Court found the Florida procedure unconstitutional, quoting from the classic statement in *Johnson v. United States*:[41]

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[42]

Whoever else may be included within the definition of a "neutral and detached magistrate,"[42.1] it is clear that it does not encompass prosecutors or police, participants in the "competitive enterprise" who cannot be expected to maintain an impartial view of their own work product. Moreover, because the enterprise is competitive and time may be of the essence, arrest and search decisions of government agents may often be hurried as well as zealous.[43] Recognition of these realities underpins the constitutional policy against warrantless

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[40] 420 U.S. at 112-19.

[41] 333 U.S. 10, 13-14 (1948). *Johnson* involved the validity of a search rather than an arrest. But the fourth amendment governs both. The probable cause decision must be made by a neutral and detached magistrate before a warrant may issue for either an arrest or a search. In *Johnson* the Court concluded that the determination must be made by a "judicial officer, not by a policeman or government enforcement agent." *Id.* at 14.

[42] 420 U.S. at 112-13 (quoting *Johnson*, 333 U.S. at 13-14). *See also* Schmerber v. California, 384 U.S. 757, 770 (1966): "The requirement that a warrant be obtained is a requirement that the inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'"

[42.1] A magistrate who is paid a fee for issuing a warrant but receives no remuneration when a warrant is denied does not qualify as a "neutral and detached" magistrate for fourth amendment purposes. Connally v. Georgia, 97 S. Ct. 546 (1977).

[43] In United States v. Lefkowitz, 285 U.S. 452, 464 (1932), the Court observed:

> Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitu-

searches except in well-defined circumstances in which the need for immediate action outweighs the need to interpose a disinterested magistrate between police and citizen.[44] Although the constitutional policy differs in the context of arrest, there being no general requirement of a warrant,[45] there remains a judicial preference for the warrant process[46] since an arrest warrant serves the same fourth amendment values as a search warrant:

> The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause.[47]

The preference for the warrant process is consistent with the statement in *Pugh* that "once the suspect is in custody, . . . the

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tion are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.

The policy favoring the warrant process was restated in Jones v. United States, 362 U.S. 257, 270-71 (1960):

> In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded.

[44] However, where there are no circumstances excusing the necessity of a search warrant, a warrantless search may be invalid even though the police had information which would be sufficient to establish probable cause before a magistrate. *See* Katz v. United States, 389 U.S. 347, 357 (1967):

> Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," . . . for the Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . ." . . . "Over and over again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," . . . and that searches conducted outside the judicial process, without prior approval by judge or the magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. [Citations omitted].

[45] United States v. Watson, 96 S.Ct. 820 (1976). The Court based its holding in part on the fact that an express act of Congress had given postal employees power to arrest *felons* without a warrant, and that acts of Congress carry a "strong presumption of constitutionality." *Id.* at 824.

[46] Law enforcement officers may find it wise to seek arrest warrants where practicable to do so, and their judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate. . . . But we decline to transform this judicial preference into a constitutional rule . . . .

Id. at 827-28.

[47] Wong Sun v. United States, 371 U.S. 471, 481-82 (1963).

reasons that justify [a warrantless arrest] . . . evaporate."[48] Thus, after the suspect is arrested, a probable cause determination must be made by a magistrate. Similarly, the fourth amendment requires that an officer seeking a warrant make a particularized showing of probable cause before the magistrate.[49] To require less would reduce the function of the magistrate to that of a "rubber stamp" for the officer's conclusory allegations of probable cause.[50]

That a prosecuting attorney does not qualify as a neutral and detached magistrate for purposes of the fourth amendment was decided prior to *Pugh*. In *Mancusi v. DeForte*,[51] the Court held that a subpoena duces tecum issued by the district attorney could not serve the function of a search warrant because of the absence of the "indispensable condition" that the inferences from facts to establish probable cause be drawn by a neutral and detached magistrate instead of the officer engaged in the "competitive enterprise of ferreting out crime."[52] Later, in *Coolidge v. New Hampshire*,[53] the search warrant was held invalid because it was issued by the state attorney general acting in his capacity as a justice of the peace. The attorney general later served as the chief trial attorney, and he had issued an arrest and search warrant after he had taken charge of all police activities relating to the case. Under these circumstances, the attorney general could not qualify as a neutral and detached magistrate because "prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations—the 'competitive enterprise' that must rightly engage their single-minded attention."[54] Thus the essential quality of the fourth amendment magistrate is that it be "someone independent of police and prosecution."[55]

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[48] 420 U.S. at 114.

[49] Berger v. New York, 388 U.S. 41, 55 (1967). The requirement of showing particularized facts to establish probable cause is significant, since no similar requirement exists when the officer seeks an indictment before a grand jury. Thus, the officer may seek and obtain an indictment on conclusory, hearsay evidence which would not support the issuance of a warrant by a magistrate. *See* note 154 *infra*.

[50] In Aguilar v. Texas, 378 U.S. 108, 111 (1964), the Court observed that since the informed and deliberate determination of a magistrate is preferred over the hurried action of a police officer engaged in the "competitive enterprise," the facts presented to the magistrate must be sufficient for an independent evaluation or the fourth amendment is reduced to a nullity. The magistrate must perform "his 'neutral and detached' function and not serve merely as a rubber stamp for the police." *See also* United States v. Ventresca, 380 U.S. 102, 109 (1965).

[51] 392 U.S. 364 (1968).

[52] *Id.* at 371.

[53] 403 U.S. 443 (1971).

[54] *Id.* at 450.

[55] 420 U.S. at 118.

In *Shadwick v. City of Tampa*,[56] the Court defined the two essential qualities of a neutral and detached magistrate as "detachment" and "capacity." At issue was a provision in the Tampa city charter authorizing municipal court clerks to issue arrest warrants for city ordinance violations. The clerks were not judicial officers, nor were they required to be lawyers or to have any formal legal training. They performed no judicial duties other than the issuance of warrants. Notwithstanding several prior decisions that had used the term "judicial officer" to describe the fourth amendment magistrate,[57] the Court concluded that the Constitution does not require someone who is a judge or formally a member of the judicial branch of government:

> Past decisions of the Court have mentioned review by a "judicial officer" prior to issuance of a warrant. . . . In some cases the term "judicial officer" appears to have been used interchangeably with that of "magistrate." . . . In others, it was intended simply to underscore the now accepted fact that someone independent of the police and prosecution must determine probable cause. . . . The very term "judicial officer" implies, of course, some connection with the judicial branch. But it has never been held that only a lawyer or judge could grant a warrant, regardless of the court system or the type of warrant involved.[58]

The Court noted that prior to 1968 United States Commissioners were not required to be lawyers, and that under the Federal Magistrates Act of 1968[59] part-time magistrates need not be lawyers.[60]

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[56] 407 U.S. 345, 350-51 (1972).

[57] *E.g.*, Johnson v. United States, 333 U.S. 10, 14 (1948).

[58] 407 U.S. at 348. The Court emphasized the fact that the city clerks were subject to supervision by a municipal court judge and, therefore, had some connection with the judiciary. A different question would have been raised if the clerks were entirely removed from the judiciary.

> Many pesons may not qualify as the kind of "public civil officers" we have come to associate with the term "magistrate." Had the Tampa clerk been entirely divorced from a judicial position, this case would have presented different considerations. Here, however, the clerk is an employee of the judicial branch of the city of Tampa, disassociated from the role of law enforcement.

Id. at 352.

[59] 28 U.S.C. § 631(b)(1) (1970).

[60] 407 U.S. at 349 n. 8. Many states continue to permit nonlawyers to hold judicial offices in the lower courts. *See, e.g.*, OHIO REV. CODE ANN. § 1905.01 (Page Supp. 1975) (mayor's court).

At least two states have held that it is a denial of fundamental constitutional rights to subject a criminal defendant to a trial before a nonlawyer judge. "Since our legal system regards denial of counsel as a denial of fundamental fairness, it logically follows that the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments likewise must be considered a denial of due process." Gordon v. Justice Court, 12 Cal. 3d 323, 332, 525 P.2d 72, 78, 115 Cal. Rptr. 632, 638 (1974). A similar result was reached in the case of *In re* Judicial

Under the circumstances present in *Shadwick*, the Court decided that nonlawyers could be entrusted with the fourth amendment responsibilities of determining probable cause and issuing warrants.[61]

However, it must be recognized that in many cases the determination of probable cause may require considerable legal expertise. Often the elements of felonies and regulatory offenses are numerous and complex, and while the limitations on the kinds of evidence upon which the magistrate may rely in determining probable cause are not many, they too are quite complex.[62] Accordingly, nonlawyers may not always have the capacity required of a magistrate. In *Shadwick*, the Court held that "an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search."[63] Since the warrant process represents an independent assurance that a search or arrest will not proceed until probable cause is shown to exist, that assurance would be lacking if the case involved legal or evidentiary issues beyond the ken of the magistrate.

The requirement of capacity was met in *Shadwick* for two reasons. First, the clerks were authorized to issue warrants for ordinance violations, but not for offenses under the state code. Since the ordi-

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Interpretation of 1975 Senate Enrolled Act No. 441, 332 N.E.2d 97, 98 (Ind. 1975). The court found unconstitutional a statute that provided for lay judges, observing that "the potential deprivation of due process as to persons charged with a crime in such courts requires us to hold that the qualifications to hold such a position as county judge can be no less than the qualifications required of an attorney who is permitted to represent such persons in those courts."

> In North v. Russell, 96 S. Ct. 2709 (1976), the Supreme Court held
> that the Kentucky two-tier trial court system with lay judicial officers in the first tier in smaller cities and an appeal of right with a *de novo* trial before a traditionally law-trained judge in the second does not violate either the due process or equal protection guarantees of the Constitution of the United States . . . .

Id. at 2714. Presumably, it was the trial *de novo* feature that saved the procedure from being found unconstitutional. In dissent, Mr. Justice Stewart noted that:

> A judge ignorant of the law is simply incapable of performing these [judicial] functions. If he is aware of his incompetence, such a judge will perhaps instinctively turn to the prosecutor for advice and direction. But such a practice no more than compounds the due process violation.

Id. at 2717.

[61] An examination of the Court's decision reveals that the terms "magistrate" and "judicial officer" have been used interchangeably. Little attempt was made to define either term, to distinguish the one from the other, or to advance one as the definitive Fourth Amendment requirement. We find no commandment in either term, however, that all warrant authority must reside exclusively in a lawyer or judge. Such a requirement would have been incongruous when even within the federal system warrants were until recently widely issued by nonlawyers.

407 U.S. at 349.

[62] *See, e.g.*, Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). *See* text accompanying notes 140-43 *infra*.

[63] 407 U.S. at 350.

nances included only common misdemeanor offenses, and excluded complex felonies, formal legal training was not required by the fourth amendment. Second, as clerks they were exposed to the content and meaning of the municipal ordinances on a daily basis, and functioned under the direct supervision of the municipal courts. The Court found that the requirement of capacity was met with the observation that:

> The clerk's authority extends only to the issuance of arrest warrants for breach of municipal ordinances. We presume from the nature of the clerk's position that he would be able to deduce from the facts on an affidavit before him whether there was probable cause to believe a citizen guilty of impaired driving, breach of peace, drunkenness, trespass, or the multiple other common offenses covered by a municipal code. There has been no showing that this is too difficult a task for a clerk to accomplish.[64]

The clerks satisfied the detachment requirement as well since they were not involved with police or prosecution in any way that might distort an independent, unbiased judgment of probable cause. The Court found the essence of detachment to be "severance and disengagement" from the functions of police and prosecution:

> Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement. There has been no showing whatever here of partiality, or affiliation of these clerks with prosecutors or police. The record shows no connection with any law enforcement activity or authority which would distort the independent judgment the Fourth Amendment requires.[65]

The Tampa clerk was detached because he was "removed from prosecutor or police and works within the judicial branch subject to the supervision of the municipal court judge."[66]

Applying the tests of *Shadwick*, one might ask whether the grand jury can satisfy the dual fourth amendment requirements of detachment and capacity. Unlike the Tampa city clerks, grand jurors must make probable cause decisions with respect to the most complex felonies. Grand jurors are not lawyers and few have had any significant experience with the legal system prior to their terms of service. From the standpoint of experience and training, grand jurors are less

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[64] *Id.* at 351. The Court further stated: "Our legal system has long entrusted nonlawyers to evaluate more complex and significant factual data than that in the case at hand. Grand juries daily determine probable cause prior to rendering indictments, and trial juries assess whether guilt is proved beyond a reasonable doubt." *Id.* at 351-52.

[65] 407 U.S. at 350-51.

[66] *Id.* at 351.

capable of the fourth amendment function than the Tampa clerks. Nor do they fare better with respect to the requirement of detachment. Grand juries are not, in reality, "severed and disengaged" from the prosecuting attorney. Instead, the law places the grand jury in a position of dependency upon the office of the prosecutor. The arguments are persuasive that fourth amendment responsibilities are misplaced with the grand jury.

III. THE DETACHMENT OF THE GRAND JURY

A. *Historical Development*

The origin of the grand jury system in England is obscured by its antiquity. In its modern form, the institution can be traced to 1368, when it became the custom to call a panel of twenty-four, *le graunde inquest,* to inquire into criminal activity in the county.[67] However, its roots can be found as early as 1166 in the inquest process established by the Assize of Clarendon.[68] From the beginning it was an accusatorial body acting as an arm of the court, "ferreting" out crime in the locality.[69] In its early form, the inquest lacked the independence that is today claimed to be its greatest virtue. Singly and collectively, the jurors were answerable to the court and could be required to report the reasons underlying their decisions and the evidence upon which they had acted.[70] The proceedings were not conducted in secret. The courts could, and often did, monitor the progress of the inquest.[71] Prior to the development of trial by jury, the inquest served the functions of both accuser and prosecutor since the effect of an accusation was almost certain conviction.[72]

The grand jury did not begin to assume its modern form until the development of the rule of secrecy, the event described as "the seed . . . which was destined to change the grand jury from a mere instrument of the crown to a strong independent power which stood steadfast between the crown and the people in the defence of the liberty of the citizen."[73] The rule was established in Bracton's time;

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[67] G. EDWARDS, *supra* note 1, at 2.

[68] *Id.* at 7. Thus, *le graunde inquest,* while the beginning of the institution we recognize today as the grand jury, was "but the new branch of a tree already firmly rooted among English institutions." *Id.* at 26.

[69] *Id.* at 27.

[70] *Id.*

[71] *Id.*

[72] Under the provisions of the Assize of Clarendon the injured party gave evidence before a group of 16 who would decide whether to return an accusation. Since the accused was limited to trial by ordeal, a test which few, if any, survived, the accusation itself was tantamount to a finding of guilt. L. CLARK, *supra* note 1, at 8-9.

[73] G. EDWARDS, *supra* note 1, at 27.

later, an oath of secrecy was also demanded of the jurors. The purpose of the rule, however, was not to strengthen the grand jury as an independent institution. It was designed only to prevent the subject of the inquest from fleeing upon learning of the investigation. The grand jury could not yet claim to be an independent body standing between subject and king, for the jury remained accountable to the court and could be interrogated and required to justify its verdicts.[74]

Final acceptance of the concept of grand jury secrecy occurred at about the time of the passing of trial by ordeal and its replacement with trial by jury. Since petit jurors were selected, in part, because of their personal knowledge of the facts of the case, and could be held accountable for their verdicts, it was no longer thought necessary that the grand jury remain subject to interrogation with respect to the accusation decision.[75] In time, grand jury proceedings were not only secret but jurors were not accountable to the courts. It is these attributes which are claimed to have transformed the grand jury into a strong independent power standing between the people and the "unjust designs of the government."[76]

B. *Role as "Defender of the People"*

The claim is often made that historically the grand jury has served effectively as the defender of the people against unjust and overzealous prosecution. Review of the cases cited in support of this claim suggests that the grand jury has been more effective in frustrating prosecutions by an unpopular government regardless of whether prosecution was legally justified. Two early cases often cited as historical examples of the protective function of the grand jury are those of Stephen Colledge and the Earl of Shaftesbury, described by one historian as the "two most celebrated instances of the fearless action of the grand jury in defending the liberty of the subject . . . ."[77] It is more likely, however, that refusal to indict in those cases merely reflected the jurors' political sentiment against an unpopular monarch rather than a considered decision that the evidence was insufficient to justify criminal prosecution.[78]

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[74] *Id.*

[75] *Id.* at 27-28. At the same time, with the passing of trial by ordeal, the grand jury, for obvious reasons, became a less terrible and powerful prosecutorial agency. *See* L. CLARK, *supra* note 1, at 9.

[76] G. EDWARDS, *supra* note 1, at 28.

[77] *Id.*

[78] The Earl of Shaftesbury and his follower Stephen Colledge, political opponents of Charles II, were subjected by the King to London grand jury inquests on charges of treason. The London grand juries refused to indict either, insisting upon secrecy and independence from the court, despite considerable pressure from the King. Many commentators rely on these cases

The history of the grand jury in this country also does not indicate that it has served institutionally to protect innocent citizens from unfounded criminal charges. Often it has served to protect law violators, rather than the innocent, especially during times of political stress when the jurors agreed with the views of the subject of inquest. During the colonial and revolutionary periods grand juries regularly refused to indict rum runners, smugglers, and other law violators perceived by the jurors as opponents of England and, therefore, "patriots."[79] Before the Civil War, southern grand juries attempted to further their regional interests by using the criminal process against those perceived as opponents and by sheltering the friendly from criminal prosecution.[80] After the war, grand juries in the South were in the forefront of the struggle against Reconstructionists and carpetbaggers, and often shielded the Ku Klux Klan from prosecution.[81]

If there is any historical lesson to be taken from our experience with grand juries, it is that they, perhaps more than most democratic political institutions, reflect the passions and prejudices of the community. "The grand jury never developed fully into a 'neutral' institution scrupulously sifting the evidence and providing protection only for the innocent."[82] Popular causes and individuals have been protected even though lawless, while the unpopular have been harassed and prosecuted without just cause.[83] In the states, grand jurors gener-

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for the claim that the grand jury had become the protector of the innocent. Professor Clark points out, however, that the grand juries in London were composed of pro-Anglicans whose political sympathies were with the accused. Charles later went to Oxford to assemble a more favorable grand jury and Colledge was indicted, convicted, and executed. Shaftesbury fled England (as did the foreman of the London grand jury) to avoid the same fate. L. CLARK, *supra* note 1, at 9-12.

[79] *Id.* at 16-18. Throughout the revolution the grand jury was an important political body which vocally denounced British oppression and protected patriots. *Id.* Judges used the charge to the grand jury as a forum to vent political views. R. YOUNGER, *supra* note 1, at 19, 27-40. Often the effect of grand jury refusal to indict for blatant violations was to nullify the law.

[80] R. YOUNGER, *supra* note 1, at 85-105.

[81] *Id.* at 106-33. Similarly, the grand juries often were the focal point of the struggle in Utah between Mormons and Christians. *Id.* at 171-77.

[82] L. CLARK, *supra* note 1, at 20.

[83] "[I]n periods of severe political stress, or when a locality or the nation has been caught up in some intense ideological struggle, the grand jurors have shared the political sympathies of the prosecuting agent, and unpopular accused people have not been protected against improper or politically inspired charges." *Id.* at 26.

Professor Clark suggests that the Nixon administration used the grand jury effectively to harass a wide range of dissidents and critics. The grand jury was used effectively as a weapon in itself even where convictions could not be obtained. The Internal Security Division of the Justice Department, headed by Guy Goodwin, conducted over 100 grand jury investigations, calling 1,000 to 2,000 witnesses over a three-year period. Yet, only 200 indictments were returned, and of those that came to trial only ten percent resulted in convictions. *Id.* at 49-50. In an earlier era, grand juries were used against union organizers when union activities were

ally have agreed with the view of the local prosecuting attorney who was elected by popular vote,[84] and it is unlikely that many jurors have viewed the prosecutor as a potential threat to innocent citizens. Thus, while the grand jury may have been instrumental in achieving a rough, popularly acceptable justice in America, it is doubtful that historically it served "as a primary security to the innocent against hasty, malicious and oppressive prosecution."[85]

C. *The Grand Jury Today*

There is no evidence that the grand jury of today is any more a bulwark of liberty than in the past. In addition to being placed by the law in a situation of dependency upon the prosecuting attorney, grand jurors are, for the most part, sympathetic to the views and goals of the prosecutor. Rather than perceiving their function as the guardian against prosecutorial excess, most jurors probably have a sense of being part of a joint struggle with the prosecutor against the criminal element of the community.[86] Thus the primary function of the grand jury remains that of the accuser and not the defender of the people,[87] and in performing this function it must establish and

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viewed as a threat to freedom. A notable example was the conspiracy indictment againt Eugene V. Debs in 1894 as a result of the Pullman strike. *See* R. YOUNGER, *supra* note 1, at 214-16.

[84] Although federal district attorneys are appointed, most state prosecutors are elected officials, and it is at the state level that most criminal matters are processed. A common method of juror selection is by use of voters lists, which most often results in a jury reflecting values of the majority of the community with little or no representation of minority groups. Accordingly, it is fair to speculate that grand juries are not often at odds with the prosecutor. The reported instances in which juries have opposed their prosecutors usually involved cases of alleged political corruption. The most celebrated triumphs of the grand jury in this country as an independent institution, and perhaps the only significant instances of resistance to prosecutorial control, involved struggles against local political figures in the late nineteenth and early twentieth centuries. In 1872 the infamous Tweed Ring was smashed by a grand jury acting without the assistance of the official prosecutor. *See* R. YOUNGER, *supra* note 1, at 182-86. The public image of the grand jury improved further during Thomas E. Dewey's anti-racketeering campaign in the 1930's. *Id.* at 234-36.

[85] Wood v. Georgia, 370 U.S. 375, 390 (1962).

[86] Perhaps the demands made upon the grand jury are inconsistent with human experience. It is asked both to investigate criminal activity and return an accusation, as well as to carefully sift and weigh the evidence as the defender of the innocent. It may be too much to ask of any group that it objectively analyze its own work product in this manner. It has been suggested that in fact the prosecuting attorney more often serves as the defender of the people against grand jury excesses. "Realistically, the most demanding task faced by a conscientious prosecutor in a grand jury room is that of making a defendant's rights understandable to a grand jury bent on indicting without sufficient evidence but upon great provocation." Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153, 155 (1965). One author suggests that the functions of investigation and indictment be separated so that the grand jury would not be required to do both. L. CLARK, *supra* note 1, at 142-43.

[87] Many assume that if the accusatorial function is performed properly, the natural by-product will be protection of the innocent. *See, e.g.*, G. EDWARDS, *supra* note 1, at 37:

> Primarily the object of the grand jury is not to protect the innocent, for all accused

maintain a close working relationship with the prosecuting attorney.

In performing both its accusatorial and its investigative duties, the grand jury has evolved into a passive body. While it is the formal responsibility of the grand jury to investigate criminal activity to determine whether an indictment should be returned, the jury itself does very little investigating. Instead, the prosecuting attorney and police conduct their own investigations, since "an obvious limitation" on the jury's ability to initiate and conduct investigations is the total absence of investigative personnel and resources independent of police and prosecutor.[88] Without the prosecutor's guidance, the grand jury lacks the experience and expertise necessary to conduct even a moderate-sized investigation.[89] Since the prosecutor can control the amount and quality of evidence produced by the grand jury "investigation," the decision to return an indictment frequently is no more than a perfunctory approval of the prosecutor's wishes based upon very little evidence.[90]

Furthermore, the events that occur within the grand jury room are largely within the control of the prosecuting attorney.[91] In vir-

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persons are presumed innocent until the contrary is shown, but is to accuse those persons, who, upon the evidence submitted by the prosecutor, if uncontradicted, would cause the grand jurors to believe the defendant guilty of the offense charged.

[88] KAMISAR, *supra* note 5, at 879 note *g*.

[89] *See* Antell, *supra* note 86, at 155: "The so-called grand jury 'investigation' . . . is really nothing more than a review of the prosecutor's predigested evidence and a ratification of his conclusions." At least one federal court recognizes that a grand jury subpoena is, in reality, an instrumentality of the prosecutor. *In re* Grand Jury Proceedings, 486 F.2d 85, 90 (3d Cir. 1973).

[90] Indictments may be based entirely upon a single affidavit of a police officer or an oral summary of such an affidavit by a prosecutor. A Philadelphia study showed that in 80-90 percent of the cases brought before a grand jury the affidavit of a police officer (who never appeared before the grand jury) was the only evidence presented. Indictments were seldom refused because of the slim evidence presented. *See* Bray, *Not-So-Grand Juries*, Wall St. J., July 29, 1971, at 1. In Parton v. State, 455 S.W.2d 645 (Tenn. Crim. App. 1970), the indictment was based solely on the prosecutor's oral summary of evidence given before a prior grand jury that had refused to indict. While the court on appeal disapproved of the practice, it refused to dismiss the indictment, citing the established rule that the sufficiency of the evidence before a grand jury is not subject to review by the courts.

[91] In no jurisdiction is the prosecutor given express authority to control the grand jury. The control results from the fact that the grand jury is virtually unable to institute criminal charges without prosecutorial assistance. The potential for abuse inherent in the relationship was recognized recently in ABA STANDARDS, THE PROSECUTION FUNCTION § 3.5 (Approved Draft, 1971), by the recommendation that when the prosecutor is legal advisor to the grand jury, he may explain the law "appropriately" and express an opinion on the legal significance of the evidence provided "due deference" is accorded to the jury as an independent legal body. The prosecutor should not make statements or arguments that would be impermissible at trial and would influence the grand jury, and all statements of the prosecutor should be on the record. The commentary to § 3.5 states:

> A prosecutor should not, however, take advantage of his role as the ex parte representative of the state before the grand jury to unduly or unfairly influence it in voting upon charges brought before it. In general, he should be guided by the standards

tually every jurisdiction the prosecutor is the statutorily appointed legal advisor to the grand jury and has free access to the jury room except during deliberations.[92] Relying primarily upon the results of prior police investigations,[93] the prosecutor orchestrates the proceedings: the evidence is presented in the order and form determined by him,[94] witnesses are examined by him,[95] and the indictment is prepared and submitted to the grand jury by him.[96] In deciding whether to return an indictment, and if so, the appropriate charge, the grand jury must rely on the prosecutor's analysis of the legal significance of the evidence.[97]

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governing and defining the proper presentation of the state's case in an adversary trial before a petit jury.

As a general matter, however, the law provides no remedy when the prosecutor acts inappropriately or fails to accord due deference to the grand jury.

[92] *E.g.*, OHIO REV. CODE ANN. § 2939.10 (Page 1975): "The prosecuting attorney or assistant prosecuting attorney may at all times appear before the grand jury to give information relative to a matter cognizable by it, or advice upon a legal matter when required."

[93] *See, e.g., id.*, which imposes a duty on the prosecutor to present to the grand jury "information relative to a matter cognizable by it . . . ." The prosecutor, in turn, relies on the police for such information. *See* 8 MOORE'S FEDERAL PRACTICE ¶ 6.04 at 6-66 (2d ed. 1976): "Assisted by the various federal police agencies, the United States Attorney and his staff investigate matters which may lead to indictment, develop the evidence, and marshal it before the grand jury."

[94] In many jurisdictions the prosecuting attorney as well as the grand jury is authorized to subpoena witnesses. *E.g.*, OHIO REV. CODE ANN. § 2939.12 (Page 1975), which provides that the clerk shall issue a subpoena when "required by the grand jury, prosecuting attorney, or judge . . . ." In many states the prosecutor has an absolute right to question witnesses. *E.g., id.* Even when subpoenas are issued formally in the name of the grand jury, they are in reality instrumentalities of the prosecutor. *See In re* Grand Jury Proceedings, 486 F.2d 85, 89-90 (3d Cir. 1973):

> [A]lthough federal grand juries are called into existence by order of the district court . . . they are "basically . . . a law enforcement agency." . . . They are for all practical purposes an investigative and prosecutorial arm of the executive branch of government . . . .
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> . . . although grand jury subpoenas are occasionally discussed as if they were the instrumentalities of the grand jury, they are in fact almost universally instrumentalities of the United States Attorney's office . . . .

[95] *E.g.*, OHIO REV. CODE ANN. § 2939.12 (Page 1975). Although grand juries in most jurisdictions have legal power to institute and conduct an investigation it rarely occurs in practice. ABA STANDARDS, THE PROSECUTION FUNCTION § 3.4 (Approved Draft, 1971), apparently would deny the grand jury the legal power to act independently of the prosecutor in any case. It takes the position that the decision to charge should be the primary responsibility of the prosecutor; citizen complaints should be screened first by the prosecutor for "prior approval" before submission to the grand jury, and the prosecutor's action or recommendation should be communicated to the grand jury.

[96] A grand jury composed of nonlawyers hardly could be expected to draft an indictment sufficient to comply with the technical rules of criminal pleading. The indictment ordinarily is drafted by the prosecutor and submitted to the grand jury for its approval. *See, e.g.*, United States v. Gower, 447 F.2d 187 (5th Cir.), *cert. denied*, 404 U.S. 850 (1971). *See generally* 8 MOORE'S FEDERAL PRACTICE ¶ 6.02[2][c] (2d ed. 1976).

[97] For example, the grand jury could not be expected to distinguish among the different degrees of homicide. The dependency of the grand jury on the prosecutor is formalized and

The observation that the modern grand jury has become little more than a "rubber stamp" for the prosecuting attorney is not a recent one. In their 1922 study of the Cleveland court system, Pound and Frankfurter concluded that:

> As a matter of fact, the grand jury does little more than register in formal shape the opinion of the prosecuting attorney that there is sufficient proof to warrant a trial. Very rarely does the grand jury indict when the opinion of the prosecuting attorney is to the contrary, and vice versa.[98]
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> . . . .
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> . . . Generally, the grand jury does little more than rubber-stamp the opinion of the prosecutor. It is almost exclusively dependent upon him for its knowledge of the law, and for its information on the facts it is almost entirely dependent on his zeal and willingness.[99]

The empirical studies that have been conducted support this view.[100] The National Advisory Commission recently recommended the elimination of the grand jury in all but the most exceptional of cases, finding the adversarial preliminary hearing a more effective process for screening out unwarranted charges:

> It is unlikely that the grand jury is effective as a buffer between the State and a person suspected of a criminal offense.The presentation of evidence is under prosecutorial control and the grand jury merely agrees to the actions of the prosecutor. In Baltimore, Md., for example, the grand jury returned indictments in 98.18 percent of

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sanctioned by the statutes designating him the legal advisor of the grand jury. *See* note 92 *supra.*

[98] R. POUND AND F. FRANKFURTER, CRIMINAL JUSTICE IN CLEVELAND 176 (1922).

[99] *Id.* at 212. The grand jury was criticized for its lack of independence from the prosecutor as early as 1893. *See* Chaplin, *Reform in Criminal Procedure*, 7 HARV. L. REV. 189, 191 (1893), *cited in* L. ORFIELD, *supra* note 11, at 179-80. The famous Wickersham Report of 1931 sided with the critics of the grand jury: "The grand jury usually degenerates into a rubber stamp wielded by the prosecuting officer according to the dictates of his own sense of propriety and justice. It has ceased to perform or be needed for the function for which it was established." 4 NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 125 (1931).

[100] The empirical study most often cited as evidence of the subordinate role of the grand jury is Morse, *A Survey of the Grand Jury System* (pts. 1-3), 10 ORE. L. REV. 101, 217, 295 (1931). A few critics found the results of the study inconclusive. *E.g.*, Hall, *Analysis of Criticism of the Grand Jury*, 22 J. CRIM. L.C. & P.S. 692, 694 (1932). Professor Hall's article was written in response to Professor Moley's claim that the evidence supports the conclusion that the grand jury is ineffectual as a check on prosecutorial abuses. *See* Moley, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 MICH. L. REV. 403 (1931). If it be assumed that most prosecutors are responsible public servants, and grand juries rarely are called upon to deter meritless prosecutions, the percentage of "no true bills" may be considered substantial. "Indeed, it may be argued that normally the grand jury and the prosecuting attorney should agree, and that the fact of agreement shows a proper spirit of cooperation." L. ORFIELD, *supra* note 11, at 180.

> those cases presented to it in 1969, but 42 percent of those indictments were dismissed before trial. . . .
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> In most cities where the grand jury is used it eliminates fewer than 20 percent of the cases it receives. In Cleveland, Ohio, the figure is 7 percent; in the District of Columbia, 20 percent; and in Philadelphia, Pa., 2 to 3 percent.
>
> The Special Committee on Crime Prevention and Control concluded that the preliminary hearing was a more effective screen for unfounded prosecutions based on a finding of a lack of probable cause than was the grand jury.[101]

Courts and commentators alike have become increasingly critical of the grand jury in recent years.[102] The Supreme Court, while continu-

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[101] 4 NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 75 (1973).

[102] After 32 years on the federal bench, one judge urges the abolition of the grand jury system:

> This great institution of the past has long ceased to be the guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor—too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury.

Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229, 253 (1972). Judge Antell of New Jersey is of a similar view: "The so-called grand jury "investigation" . . . is really nothing more than a review of the prosecutor's predigested evidence and a ratification of his conclusions." Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153, 155 (1965).

Recent literature abounds with expressions of doubt concerning the effectiveness of the grand jury as a bulwark of liberty. *See* Weinberg and Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 MICH. L. REV. 1361, 1380 (1969) ("the prosecutor's influence is usually controlling.") The grand jury has eroded to the status of "merely another weapon in the government's fact-finding arsenal." Boudin, *The Federal Grand Jury*, 61 GEO. L.J. 1 (1972). It is no longer a group of peers sitting to protect citizens; instead, it is an arm of the state, more powerful than ever before, serving the ends of the prosecution. *Id.* at 35.

> In this country numerous studies undertaken to assess the efficacy of the grand jury have all concluded that it is no longer effective in protecting individuals against arbitrary prosecutions, and that it no longer exercises the independent judgment required by due process.

Alexander and Portman, *Grand Jury Indictment Versus Prosecution by Information– An Equal Protection-Due Process Issue*, 25 HASTINGS L.J. 997, 1000 (1974).

> While the grand jury in England was able to maintain considerable independence from government prosecutors, the grand jury today is much more dependent on the prosecutor for its successful operation. Indeed, the grand jury normally hears only those cases presented by the prosecutor and only the prosecution's side of those cases. He is responsible for securing the attendance of witnesses whom he selects, and also for the presentation of other evidence. He conducts the examination of witnesses, instructs the grand jurors as to what laws are alleged to have been violated, and draws the indictment. As a public official and lawyer, the prosecutor may also command considerable respect from the lay persons constituting the grand jury.
>
> With his added responsibility and power comes the danger that the prosecutor may also be able to prejudice or even manipulate the grand jurors and obtain an indictment when there may not be sufficient evidence to hold an accused for trial.

ing to indorse the grand jury as an institution, nonetheless has recognized that it "may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor . . . ."[103]

Not surprisingly, those who have urged the abolition of the grand jury have claimed that it is ineffectual as a check against wrongful prosecution.[104] In 1850 an abolitionist delegate to a state constitutional convention contested the historical claim that the grand jury system defended the rights of the people.

> To those who tell us that the Grand Jury was established in England, and has been used for the protection of the rights and privileges and freedom of the people, I would reply, that History does not sustain them in that position. In all the important State trials in England, from the time of Sidney down to the trial of the great Irish agitator, O'Connell, the Grand Jury has not been effective in the service of popular rights. . . . History will bear me out in the assertion that whenever it has suited the interests or the will of the King to have this or that subject indicted, whether the object was the ruin of private character or the . . . sequestration of rich es-

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> This conduct may take several forms and may occur at different stages in the indictment process. It may occur, for example, when the prosecutor is permitted to use abusive language when discussing the character of the accused before the grand jury. The prosecutor may also attempt to create preindictment publicity, which might include unsubstantiated factual assertions, in the hope of inflaming public sentiment and reaching prospective grand jurors.

Johnston, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. L.C. & P.S. 157, 160-61 (1974).

[103] United States v. Dionisio, 410 U.S. 1, 17 (1973). Justice Douglas in dissent was less charitable: "[I]t is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive." *Id.* at 23.

Justice Marshall, also in dissent, recognized that serious fourth amendment problems arise when the grand jury fails to exercise its "historic role":

> Whatever the present day validity of the historical assumption of neutrality that underlies the grand jury process, it must at least be recognized that if a grand jury is deprived of the independence essential to the assumption of neutrality—if it effectively surrenders that independence to a prosecutor—the dangers of excessive and unreasonable official interference with personal liberty are exactly those that the Fourth Amendment was intended to prevent.

Id. at 46.

[104] In England the movement to abolish the grand jury began as early as 1825 with Jeremy Bentham, who claimed then that the grand jury had outlived its usefulness by more than a century. The abolitionists finally succeeded; the grand jury was rarely used in England after World War I and was formally abolished in 1933. *See* YOUNGER, *supra* note 1, at 56-71, 134-54; L. ORFIELD, *supra* note 11, at 140, 191. The abolitionists in this country have enjoyed less success; the grand jury has not been wholly abolished in any state. *See* note 5 *supra*. Nearly half of the states permit prosecution of most felonies by information or indictment at the option of the prosecutor. Much of the reform movement occurred in western and midwestern states during the nineteenth century. *See generally* R. YOUNGER, *supra*.

> tates, or the gratification of private pique and animosity, the Grand Jury has ever been found the willing instrument of the Crown.[105]

One need not resolve the controversy to conclude that the grand jury is an inappropriate substitute for the neutral and detached magistrate required by the fourth amendment. The grand jury falls far short of the detachment test of *Shadwick*. Regardless of whether it is always (or even sometimes) the rubber stamp of the prosecutor, it is clear that the functions of grand jury and prosecutor are intimately related. Indeed, in the states where prosecution by information is allowed, prosecutor and grand jury share the function of bringing an accusation. To perform their tasks well, grand jury and prosecutor must establish a close working relationship with mutual dependency and support. The grand jury simply could not function if it were to maintain a condition of "severance and disengagement" from the prosecutor. It cannot be free of the potentially distorting connection with the prosecutor condemned by the Court in *Shadwick*.[106] Its situation is not at all similar to that of the Tampa clerks who had "no connection with any law enforcement activity or authority which would distort the independent judgment the Fourth Amendment requires."[107] The fact that the grand jury functions in secret with no one present but the prosecutor is reflective of the intimate relationship and the serious potential for distortion. If the grand jury, together with police and prosecutor, is a part of the "competitive enterprise," it is not material that it has also on occasion performed the "historic role"[108] of guardian of the innocent. We should reconsider the wisdom of our "willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate."[109]

IV. THE CAPACITY OF THE GRAND JURY

The second requirement of *Shadwick* for fourth amendment magistrates is the capacity to make probable cause decisions.[110] Since the decision ultimately is a conclusion of law, it is obvious that lawyers should be best qualified for the task. But the Court in *Shadwick* rejected a per se rule that only lawyers are competent to serve as

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[105] 1 DEBATES IN INDIANA CONVENTION 136-37 (1850). The rule of grand jury secrecy was castigated as "anti-American." *Id.* at 149-50.

[106] *See* text accompanying note 65 *supra.*

[107] 407 U.S. at 350-51.

[108] *See* text accompanying note 24 *supra.*

[109] *Id.*

[110] The warrant issuing magistrate "must be capable of determining whether probable cause exists for the requested arrest or search." 407 U.S. at 350.

magistrates.[111] The Tampa city clerks were not lawyers and were not required to have formal legal training. The Court did recognize that it would be preferable to have lawyers or judges serving as magistrates,[112] but, weighing the need for flexibility at the state level, decided that nonlawyers could serve as magistrates "so long as all are . . . capable of the probable-cause determination required of them."[113]

In part, the Tampa city clerks were found capable of performing their fourth amendment tasks because their authority to issue arrest warrants extended only to ordinance violations, the most simple of offenses. They had no authority to issue warrants for violations of the state code.[114] Another significant factor was the nature of the position of clerk. By reason of daily job responsibilities, they were in more or less constant contact with the courts and the law, and could be expected to have an understanding of the city ordinances through these experiences. Moreover, they were subject to supervision by the municipal court judges and presumably would have ready access to the courts for advice. Accordingly, because of the clerk's position,

> We presume . . . he would be able to deduce from the facts on an affidavit before him whether there was probable cause to believe a citizen guilty of impaired driving, breach of peace, drunkenness, trespass, or the multiple other common offenses covered by a municipal code.[115]

The finding of capacity in *Shadwick* must be limited to the facts of that case. It does not mean that any nonlawyer, regardless of position or experience, can be given the task of deciding fourth amendment probable cause with respect to any criminal offense no matter how serious or complex. Certainly, the Court would have reached a different result if that had been the question raised in *Shadwick*. Yet, that is precisely the result when fourth amendment responsibilities are entrusted to the grand jury.

To qualify as a grand juror a person need have no prior training or experience in the law.[116] Indeed, it might well be unconstitutional

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[111] *See* note 61 *supra*.

[112] "All this is not to imply that a judge or lawyer would not normally provide the most desirable review of warrant requests." 407 U.S. at 353.

[113] *Id.* at 354.

[114] *Id.* at 347.

[115] *Id.* at 351.

[116] Prominent in its folklore we find frequent reference to the fact that grand juries are populated by people of high and low estate, from all vocational backgrounds except law and law enforcement. It is somehow suggested that there is some special merit in confiding these important responsibilities to a group of citizens who are completely untrained in the work they have to do . . . .

Antell, *supra* note 102, at 154.

to impose such requirements for jury duty.[117] Jurors generally are selected from lists of registered voters, city directories, or other sources from which a random selection of a fair cross section of the community can be made. Typically, the only statutory qualification is that grand jurors be resident electors of the county.[118] Thus jurors possess none of the characteristics that qualified the Tampa city clerks as fourth amendment magistrates. Without significant prior experience with the criminal laws, they are called upon to process cases of great factual and legal complexity.[119] It is both unfair and absurd to impose upon such persons the responsibility for complex legal decisions on which the evidence and the law may be complicated and extensive.[120]

While the grand jury cannot be expected to function competently when the evidence is presented to it by the prosecuting attorney, it is even more unrealistic to expect it to conduct an independent investigation into criminal activity.[121] As one state court judge has observed:

> It is really unthinkable that there could be a productive grand jury investigation that has not been preceded by a prolonged period of study and preparation by a prosecutor's office. Who can believe that even a moderately complex inquiry can be managed by twenty-three untrained people who must work within the framework of the law? . . . The so-called jury "investigation," therefore, is really nothing more than a review of the prosecutor's predigested evidence and a ratification of his conclusion.[122]

As noted above,[123] the grand jury has the legal authority to conduct an independent investigation, but lacks the expertise and resources needed to accomplish it. The law provides the grand jury with no investigatory personnel or resources independent of the prosecuting

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[117] No particular race or class of citizens may be systematically excluded from service on the grand jury. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522 (1975). The constitutional ideal is to select jurors at random from a fair cross section of the community. *Cf.* 28 U.S.C. § 1861 (1970) (all citizens eligible with very limited exceptions).

[118] *See, e.g.*, OHIO REV. CODE ANN. § 2939.02 (Page 1975).

[119] Ironically, in those states that require grand jury indictments, the requirement usually extends only to felonies. Thus, while the Tampa city clerks were not involved in any felony cases, grand juries generally hear only felonies.

[120] *See, e.g.*, Foster, *Grand Jury Practice in the 1970's*, 32 OHIO ST. L.J. 701 (1971) (grand jury process is inappropriate in antitrust prosecutions).

[121] It should be noted that the investigative function of the grand jury is different from the accusatorial function. In most cases the jury hears only the evidence offered by the prosecutor, which ordinarily is the product of a prior police investigation. When a grand jury investigation occurs, it is usually controlled by the prosecutor and is used to supplement the independent investigation of police authorities. In many respects, the grand jury is an investigative device which offers the prosecutor advantages that a police investigation does not. *See* note 179 *infra*.

[122] Antell, *supra* note 102, at 155.

[123] *See* text accompanying note 88 *supra*.

attorney. It is not authorized to employ independent legal counsel or investigators, and only in extreme cases may it demand a special prosecutor.[124]

Virtually no preparation or training is afforded persons selected for jury duty. At best they may be given copies of a grand jury handbook that only defines in general terms the duties, powers, and responsibilities of the grand jury.[125] Often the court's charge to the jury, delivered at the beginning of its term, is equally vague and general in content.[126] The jury is not advised that it is functioning as a fourth amendment magistrate, nor is it instructed with respect to evidentiary requirements for the issuance of a warrant.[127] Thus, although it may be told that it should not return an indictment unless probable cause is shown,[128] the practical result often is an indictment based upon evidence that would not support the issuance of an arrest warrant.[129] Rarely is the jury instructed on the elements of specific crimes.[130] For meaningful legal advice it must look to the prosecutor,

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[124] Although such appointments [of special prosecutors] are rarely made, most states authorize appointment of a special prosecutor in a grand jury investigation of alleged criminal activities of the prosecutor or his staff, and several also would appear to permit appointment for other investigations upon a showing that the prosecutor has not furnished the grand jury with sufficient legal or investigative assistance.

KAMISAR, *supra* note 5, at 880.

[125] Typically, the handbooks foster dependency and reliance on the prosecutor without advising or encouraging the grand jury to conduct its investigations independently.

> The United States Attorney will be actively engaged before the Grand Jury in presenting one by one the formal charges and in calling the witnesses to support them. Since he is a public official, usually of experience in this work and of both intelligence and sincerity, he will naturally be the constant legal advisor to the Grand Jury.

FEDERAL GRAND JURY HANDBOOK 16 (1959). *See also* STATE GRAND JURY HANDBOOK 17 (1959).

[126] *See, e.g.*, Fletcher, J., *Charge to a Grand Jury*, 18 F.R.D. 211 (1956); Kaufman, J., *The Grand Jury—Its Role and Its Powers*, 17 F.R.D. 331 (1955); Yankwich, J., *Charge to Grand Jury*, 16 F.R.D. 93 (1955).

[127] The court's charge is rarely couched in fourth amendment terms. *See, e.g., id.*

[128] *See* text accompanying notes 12 & 13 *supra*.

[129] For a fourth amendment definition of probable cause see, *e.g.*, Brinegar v. United States, 338 U.S. 160, 175-76 (1949). While the typical charge to a grand jury is not cast precisely in fourth amendment terms, it has been held that probable cause to arrest may be subsumed within the concept of probable cause to indict. *See* text accompanying note 28 *supra*. In reality, however, even though theoretically the standard for charging the accused with a crime may be higher than that for arrest, the grand jury is not bound by the same evidentiary rules as a magistrate. Thus, an indictment may be based upon unsupported hearsay and opinion. *See* text accompanying note 147 *infra*.

[130] The absence of adequate instruction may be significant when the jury should consider the subtle distinctions of the degrees of the same crime. For example, the jury must rely on the opinion of the prosecutor in deciding whether to charge first or second degree murder. Yet, for plea bargaining, fixing bail, and other purposes, the prosecutor may have an interest in charging the greater.

who might be the only person in the grand jury room not hopelessly confused by the proceedings.

> In short, the only person who has a clear idea of what is happening in the grand jury room is the public official whom these twenty-three novices are expected to check. So that even if a grand jury were disposed to assert its historic independence in the interest of an individual's liberty, it must, paradoxically, look to the very person whose misconduct they are supposed to guard against for guidance as to when he is acting oppressively.[131]

The circle is complete. By reason of its incapacity to perform its assigned tasks, the grand jury cannot be severed and disengaged from the prosecutor.[132] As a functioning institution it satisfies neither of the requirements of *Shadwick.*

V. HEARSAY AND PROBABLE CAUSE

In addition to problems of detachment and capacity, there are other reasons why the grand jury is not an appropriate body to render fourth amendment decisions. As noted above,[133] the constitutional requirement of a neutral and detached magistrate and the judicial preference for the warrant process in lieu of warrantless arrests are premised upon the value of interposing a disinterested magistrate between the citizen and state officials engaged in the "competitive enterprise." To preserve that value, and to maintain the fourth amendment as a meaningful constitutional protection, the probable cause decision must represent an independent evaluation of the facts. If the magistrate issues a warrant based solely on conclusory allegations by the police, unsupported by statements of fact, the magistrate has become the rubber stamp of the police and the fourth amendment is reduced to a nullity. Thus, when a police officer is seeking a warrant it is not enough that he merely state his belief or opinion that the suspect has committed an offense;[134] a particularized factual

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[131] Antell, *supra* note 102, at 154.

[132] The grand jury is not a proper body to reach an "independent judicial determination" of probable cause. Its determination is unlikely to be "judicial" because it is composed of laymen, whose sole guidance on legal questions will normally come from the prosecutor. Its determination is also unlikely to be "independent" in most cases because, in practice, the prosecutor's influence is usually controlling.

Weinberg and Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 MICH. L. REV. 1361, 1380 (1969).

[133] *See* text accompanying note 47 *supra.*

[134] *See* cases cited note 49 *supra*; Nathanson v. United States, 290 U.S. 41, 47 (1933).

showing of probable cause is required.[135] Similarly, a hearsay affidavit of a police officer which states only the belief or opinion of an informant is insufficient under the fourth amendment since it does not afford the magistrate an opportunity to draw the necessary inferences from the facts.[136] But not all forms of hearsay are excluded from consideration. Because of the differences between a determination of guilt at trial and a determination of probable cause, the magistrate is not limited to consideration of evidence that would be admissible at trial;[137] an affidavit reciting hearsay information may support the issuance of a warrant, "so long as a substantial basis for crediting the hearsay is presented."[138] Thus a warrant may issue on the basis of an informant's information rather than the direct personal evidence of the affiant if the information is reasonably corroborated by other matters within the affiant's knowledge.[139]

The rules governing the use of hearsay in various factual contexts are quite complex. The seminal case is *Aguilar v. Texas*.[140]

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, . . . the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was "credible . . . ." Otherwise, "the inferences from the facts which lead to the complaint" will be drawn not "by a neutral and detached magistrate," as the Constitution requires, but instead, by a police officer . . . .[141]

The requirements of *Aguilar* were described later as a "two-pronged test."[142] The affidavit in support of the issuance of the warrant must show underlying circumstances sufficient to enable a magistrate to

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[135] In most jurisdictions, the showing is made under oath by affidavit rather than by oral testimony. *See, e.g.*, FED. R. CRIM. P. 4(a):

> If it appears from the complaint [which must be upon oath under rule 3], or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it.

[136] Aguilar v. Texas, 378 U.S. 108 (1964).

[137] Jones v. United States, 362 U.S. 257, 270 (1960).

[138] *Id.* at 269. *See* Draper v. United States, 358 U.S. 307 (1959) (probable cause for warrantless arrest may be based upon substantiated hearsay); Whitely v. Warden, 401 U.S. 560 (1971); Wong Sun v. United States, 371 U.S. 471 (1963).

[139] Jones v. United States, 362 U.S. at 271. If other corroborating facts are shown, it may not even be necessary to identify the informant. *See* McCray v. Illinois, 386 U.S. 300 (1967).

[140] 378 U.S. 108 (1964).

[141] *Id.* at 114-15.

[142] Spinelli v. United States, 393 U.S. 410, 413 (1969).

independently judge the validity of the informant's information and must support the claim that the informant is credible or the information is reliable.[143] A warrant could not be issued on less of a factual showing "without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry."[144]

If we are to entrust the function of a magistrate to the grand jury we should require no less. If the return of a grand jury indictment is a sufficient basis for the issuance of an arrest warrant or continued detention of the accused without further judicial inquiry into probable cause, the grand jury should be required to observe the same standards of evidence. To permit an indictment to be based on hearsay that is insufficient for the issuance of a warrant by a magistrate makes the grand jury a mere rubber stamp for the conclusory claims of the prosecutor's witnesses and reduces the fourth amendment to a meaningless form. But the Court has yet to impose the *Aguilar* requirements on grand juries, and it is unlikely that it ever will.

In *Costello v. United States*,[145] the defendant moved to dismiss the indictment on the ground that the only evidence presented to the grand jury was the hearsay testimony of federal agents. The motion was based upon the grand jury clause of the fifth amendment, rather than fourth amendment grounds. Indeed, dismissal of the indictment would not have been a proper remedy for a violation of the fourth amendment.[146] Defendant argued that an indictment based solely on hearsay violated his right to a grand jury indictment. The argument was rejected by the Court.

> [N]either the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act. . . . In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory.[147]

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[143] *Id.* at 413.

[144] *Id.* at 419. *See also* United States v. Harris, 403 U.S. 573 (1971), which distinguished *Aguilar* and *Spinelli* but did not change the basic fourth amendment principle.

[145] 350 U.S. 359 (1956).

[146] The remedy for a fourth amendment violation is the exclusionary rule. *See* Mapp v. Ohio, 367 U.S. 643 (1961). Accordingly, to raise the issue in a fourth amendment context, the defendant must make a motion to suppress evidence seized during the search incidental to the arrest made pursuant to the warrant which issued as a matter of course upon the return of the indictment. No reported cases have been found involving a similar fact situation. Instead, the cases that raise the question of sufficiency of evidence before the grand jury do so in the context of a motion to dismiss on grounds of the fifth amendment grand jury clause (or its state constitutional equivalent).

[147] 350 U.S. at 362.

Moreover, the fifth amendment requires no preliminary evidentiary showing when the accused is charged by a prosecutor's information.

> An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.[148]

While *Costello* is not a fourth amendment case, it does state that there is no "other constitutional provision" that "prescribes the kind of evidence upon which grand juries must act."[149] Grand jurors may still rely upon their personal knowledge, even if not supported by evidence presented in the jury room, as a basis for indictment.[150]

There was no discussion in *Costello* of the constitutional value of interposing the independent judgment of the grand jury between police and citizenry. More persuasive to the Court was the desire to avoid delay in the criminal process.

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury.[151]

From a fifth amendment perspective the choice made in *Costello* makes some sense. Quite apart from problems of grand jury secrecy and discovery of grand jury transcripts, it may be argued that an indictment based solely on hearsay causes the defendant no harm at trial. Guilt or innocence ultimately will be decided by a different jury which will hear only legally competent evidence. Were an indictment dismissed for insufficient evidence, the prosecutor need only to return to the grand jury, armed with better evidence, to obtain a second

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[148] *Id.* at 363. This is consistent with *Pugh*, in which the Court concluded that the accused is only entitled to a probable cause determination as a condition of any significant pretrial restraint on liberty. There is no right to dismissal of the charge. *See* note 23 *supra*.

[149] Acting consistently with *Costello*, the Court has held that an indictment should not be dismissed solely because it is based upon evidence obtained in violation of the defendant's constitutional rights. United States v. Blue, 384 U.S. 251 (1966); Lawn v. United States, 355 U.S. 339 (1958).

[150] Many states have statutory provisions imposing a duty upon jurors to report to the grand jury any information they have that an indictable offense has been committed. *E.g.*, IND. CODE § 35-1-15-15 (1971); CAL. PENAL CODE § 918 (West 1970).

[151] 350 U.S. at 363. This policy was restated in United States v. Calandra, in which the court observed that to permit a witness to make a motion to suppress in the grand jury room would "saddle a grand jury with minitrials." 414 U.S. 338, 349-50 (1974) (quoting United States v. Dionisio, 410 U.S. 1, 17 (1973)). The issue raised in *Calandra* is quite different from that which is addressed in this article.

indictment.[152] In such a case, the defendant has gained nothing beyond mere delay.

It is quite a different matter, however, when viewed in the context of the fourth amendment, for here, a determination that an indictment was returned on less than probable cause could have an immense impact. Suppose that a person arrested without a warrant is subsequently indicted on evidence insufficient to establish probable cause in the fourth amendment sense. If the return of the indictment is an event that forecloses the accused's right to a preliminary hearing, and such a hearing was not conducted prior to indictment, the defendant will suffer the consequences of continued detention. Obviously, the harm would be more severe to a defendant who is unable to meet the conditions of bail or other pretrial release, but the consequences could also be harmful to those who can, since the evidence presented at a probable cause hearing might require immediate unconditional release or support an argument for lesser conditions of release. Moreover, it is impossible to distinguish such a case from that of *Pugh*. In *Pugh*, the Court condemned a procedure whereby a person could be detained for a significant period of time without a meaningful fourth amendment probable cause determination. Why should the grand jury be permitted to achieve a result forbidden to the prosecutor? It might often be the case that the prosecutor could secure an indictment against a defendant even though he could not establish fourth amendment probable cause before a magistrate. Continued detention of the accused after indictment would constitute a significant deprivation of liberty for which the law provides no remedy. The purpose and intent of the Court's rationale in *Pugh* applies to such a case. No rational purpose can be served by the disparate treatment of such a defendant and those who are charged by information.

A second illustration presents the fourth amendment problem even more graphically. Suppose that a grand jury indicts a defendant for gambling on the basis of evidence that would not be sufficient to establish probable cause before a magistrate. The defendant is not under arrest at the time of indictment, but when the indictment is returned a warrant of arrest is issued as a matter of course with no further inquiry into probable cause. When the defendant is arrested pursuant to the warrant, his person is searched and he is found to be carrying a concealed weapon. The defendant then is charged with

[152] This presumes, of course, that the prosecutor's only motive is to gain a conviction and not merely to harass the accused with an unfounded accusation.

carrying a concealed weapon and the gambling indictment is nol-prossed.

The problem is self-evident. Can the defendant suppress the weapon as the fruit of a search pursuant to a warrant unsupported by a showing of probable cause? Clearly, the weapon would be suppressed were the warrant issued by a magistrate. But here, the defendant can only move to suppress by challenging the sufficiency of the evidence before the grand jury that indicted him for gambling. Following the statement in *Costello* that there are no constitutional limitations on the kinds of evidence upon which a grand jury may act, coupled with Justice Powell's footnote in *Pugh* that the grand jury's determination of probable cause is "conclusive,"[153] we reach the anomalous result of a patent violation of fourth amendment rights with no exclusionary remedy. Thus, from a fourth amendment perspective, *Costello* and its ramifications are unacceptable.[154] The fourth amendment violation does have serious consequences. The right to challenge the sufficiency of the evidence presented to the grand jury may mean the difference between conviction and acquittal for the firearms violation.

One could envision several solutions to the problem. The least desirable, from both fourth and fifth amendment standpoints, would be to require the grand jury to follow the two-pronged *Aguilar* test in reaching a verdict and to refuse to indict if fourth amendment probable cause is not shown—that is, if the grand jury grounds an indictment on hearsay, it must require facts sufficient to afford an independent judgment of the validity of the hearsay and facts sufficient to support the claim that the informant is credible or the information reliable.[155] This would require educating the jurors with re-

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[153] *See* text accompanying note 24 *supra*.

[154] To some, *Costello* may not be acceptable as a fifth amendment standard. *See, e.g.*, United States v. Arcuri, 282 F. Supp. 347, 349 (E.D.N.Y.), *aff'd*, 405 F.2d 691 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969) (relying on hearsay instead of direct testimony is "pernicious"). In United States v. Umans, 368 F.2d 725, 730 (2d Cir. 1966), the court stated that

> excessive use of hearsay in the presentation of government cases to grand juries tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecutions that grand juries are supposed to afford to the innocent.

It has been observed that *Costello* opened wide the floodgates for wholesale use of hearsay before the grand jury. *E.g.*, 8 MOORE'S FEDERAL PRACTICE ¶ 6.03[2], at 6-44 (2d ed. 1976):

> As a result of *Costello*, indictments are commonly obtained entirely on hearsay evidence; the customary practice is to use only the investigating agent who presents to the grand jury the information in his file. The prosecutor's motive, in addition to simple convenience, is to avoid putting primary witnesses before the grand jury so there can be no possibility of impeachment by prior inconsistent testimony . . . .

[155] *See* note 143 *supra* and accompanying text.

spect to the legal requirements. However, because of the complexity of the rules, it may well be a practical impossibility to provide a meaningful education. In addition, to follow this course would be to define probable cause to indict as the equivalent of probable cause to arrest. It may be more desirable, as the Court recognized in *Pugh*, to separate the two concepts. Perhaps we should retain the option of requiring an accused to appear for trial without a showing of fourth amendment probable cause so long as there are no significant pretrial restraints on liberty. Moreover, to put meaning into the fourth amendment, it would be necessary to provide for a subsequent review of the grand jury evidence and provide an appropriate remedy (exclusion of evidence or release from confinement) when the indictment is not supported by the record.

A second option would be to put a magistrate in the grand jury room to hear the evidence and make the fourth amendment probable cause decision. This may be equally undesirable as a waste of judicial resources and presents the same problems with respect to subsequent judicial review and remedies.

The simplest and most desirable solution is to extend the rule of *Pugh* to prosecutions by either information or indictment, not using the indictment as a justification for either continued detention or the issuance of an arrest warrant. It would not be an intolerable burden to require a *Pugh*-type probable cause determination by a neutral and detached magistrate after the indictment is returned. In this way, basic fourth amendment values could be preserved without a major modification of the grand jury system.

Whichever course is chosen, it must be recognized that the *Costello* standard is incompatible with established fourth amendment principles. If we are to accept the grand jury as a substitute for a neutral and detached magistrate we should, at the very least, require that both abide by the same fourth amendment rules.

VI. Judicial Review

A magistrate's decision with respect to fourth amendment probable cause is reviewable at the trial and appellate levels. In the trial court, the defendant may move to suppress evidence on the ground that there was insufficient evidence before the magistrate to support the issuance of a warrant. Or if there has been a *Pugh*-type probable cause determination, the defendant may move for release from custody by motion, habeas corpus, or any other appropriate procedure that challenges the sufficiency of the evidence before the magistrate. Should the trial court refuse to suppress the evidence or order release from confinement, that decision is reviewable by courts of appellate

jurisdiction. In the case of warrants, the federal rules require that the probable cause evidence be reduced to writing and presented to the magistrate in the form of a complaint and supporting affidavits.[156] These documents comprise the record, and the defendant may challenge its sufficiency. If the evidence is facially insufficient, any evidence seized pursuant to a search incidental to the arrest will be suppressed.[157] In addition, many courts will permit a subfacial attack on the affidavits when they are facially sufficient to establish probable cause but the facts stated therein are false.[158] Likewise, the action of a police officer in making a warrantless arrest is subject to review by the courts, and appropriate remedies are available to the accused if the officer acted without probable cause.[159]

Probable cause decisions of trial courts are reviewable by courts of appellate jurisdiction. As a standard for review, the Supreme Court in *United States v. Ventresca*[160] adopted a rule of reason:

> [W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. . . . [T]he resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.[161]

The standard for review of warrantless arrests is at least as stringent as that applied to review of magistrates, if, indeed, a higher standard does not apply.[162] Thus probable cause decisions of magistrates and

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[156] FED. R. CRIM. P. 4(a). *See* note 135 *supra*. By reducing the evidence to affidavit form, a record is made which readily permits a later review of the magistrate's decision. *See, e.g.*, Giordenello v. United States, 357 U.S. 480, 485 (1958) (Rules 3 and 4, by requiring written and sworn complaints, implement the fourth amendment). *See also* United States v. Anderson, 453 F.2d 174 (9th Cir. 1971); Frazier v. Roberts, 441 F.2d 1224 (8th Cir. 1971).

[157] *See, e.g.*, Giordenello v. United States, 357 U.S. 480 (1958). Even when an officer is acting in justifiable reliance on a radio bulletin that an arrest warrant was issued, a subsequent determination that the affidavit is insufficient invalidates the arrest and search. *See* Whitely v. Warden, 401 U.S. 560, 568 (1971): "[A]n otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest."

[158] Although the issue has not been decided by the Supreme Court, these jurisdictions represent the better view. As one commentator has stated,

> sub-facial attacks should, as a matter of fourth amendment law, be permitted without restriction, for they go to the very heart of the protection of privacy. Prohibiting sub-facial attacks or imposing restrictions that are functionally equivalent to prohibition "reduces the Fourth Amendment to a form of words."

Herman, *Warrants for Arrest or Search: Impeaching the Allegations of a Facially Sufficient Affidavit*, 36 OHIO ST. L.J. 721, 760 (1975).

[159] *See, e.g.*, Henry v. United States, 361 U.S. 98 (1959); Wong Sun v. United States, 371 U.S. 471 (1963).

[160] 380 U.S. 102 (1965).

[161] *Id.* at 109.

[162] *See, e.g.*, Whitely v. Warden, 401 U.S. 560, 566 (1971); Wong Sun v. United States,

police officers are not conclusive. When a defendant is arrested or held in custody as a consequence of a probable cause determination by magistrate or police, that decision is subject to review in the trial and appellate courts, and there is a complex body of rules governing the resolution of this issue.

A historical interpretation of the fourth amendment supports the view that access to the courts for review of probable cause determinations may be a constitutional requirement. In *Pugh*, the Court looked to the "common law that has guided interpretation of the Fourth Amendment,"[163] and found that it was customary, if not obligatory, for an arrested person to be taken before a justice of the peace shortly after arrest for a determination of probable cause.[164] And the decision of the justice was subject to review:

> The initial determination of probable cause also could be reviewed by higher courts on a writ of habeas corpus. . . . This practice furnished the model for criminal procedure in America immediately following the adoption of the Fourth Amendment.[165]

How different is the effect of a probable cause determination by a grand jury! According to Justice Powell's footnote in *Pugh*, not only does it substitute the judgment of a grand jury for that of a neutral and detached magistrate, but it gives the decision of the grand jury conclusive effect. The footnote states that the return of an indictment "conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry."[166] This idea is not new to the law. Many courts have adopted the rule that the sufficiency of the evidence before the grand jury is not reviewable at trial or on appeal.[167]

As a practical matter, adequate review of grand jury evidence may not be possible, even if permitted by law, since few jurisdictions, if any, require a record to be made of grand jury proceedings.[168] The

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371 U.S. 471, 479 (1963). In *Ventresca*, the Court suggested that an even higher standard should be imposed on police who act without warrants. Because of the judicial preference for the warrant process, "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail." 380 U.S. at 106 (citing Jones v. United States, 362 U.S. 257, 270 (1960)).

[163] 420 U.S. at 114.

[164] *Id.* at 114-15.

[165] *Id.* at 115-16.

[166] *See* note 24 *supra* and accompanying text.

[167] *E.g.*, Parton v. State, 455 S.W.2d 645 (Tenn. App. 1970). It should be noted, however, that virtually all of the cases were decided in the context of a motion to dismiss rather than a motion to suppress evidence.

[168] The federal circuits are unanimously of the view that recording is permissive and not mandatory. *See, e.g.*, United States v. Trice, 476 F.2d 89 (9th Cir.), *cert. denied*, 414 U.S. 843 (1973); United States v. Skolick, 474 F.2d 582 (10th Cir. 1973); United States v. Heckman,

defendant may be precluded by the absence of a record from demonstrating the insufficiency of the evidence on a motion to suppress, even if, in fact, probable cause was not established before the grand jury. In such a case the fourth amendment indeed is reduced "to a form of words."[169] Even where an adequate record of the proceedings is made, the defendant is often denied access to it. There is no doctrine more sanctified by history and law than that of grand jury secrecy, and courts and legislatures have been extremely reluctant to broaden the scope of discovery.[170] Under the present federal rules, grand jury transcripts are available to the defendant only "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."[171] The only discovery allowed as a matter of right is that the accused may have a copy of his or her own recorded testimony before a grand jury.[172] The ancient cry of grand jury secrecy could be used to deny the accused an opportunity to raise the fourth amendment claim.

The problem of judicial review of the grand jury is significant. Federal magistrates, who are usually lawyers, are subject to review with respect to their fourth amendment decisions. Even though they may be neutral and detached, they occasionally err. It is the fact of judicial review which puts meaning into the fourth amendment. How hollow and empty would be the right to privacy and to freedom from unreasonable search and seizure if these questions could not be reviewed meaningfully in court! Grand juries are even less deserving than magistrates of insulation from judicial review. Since they may be neither neutral and detached nor capable of the fourth amendment decision, and are permitted to act on less evidence than a magistrate,

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479 F.2d 726 (3d Cir. 1973); United States v. Biondo, 483 F.2d 635 (8th Cir. 1973), *cert. denied*, 415 U.S. 947 (1974); United States v. Aloisio, 440 F.2d 705 (7th Cir.), *cert. denied*, 404 U.S. 824 (1971).

It is interesting to note, by contrast, that FED. R. CRIM. P. 5.1(c) gives the accused the right to a record of the preliminary examination if one is held.

The drafters of the ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 340.3 (Proposed Official Draft, 1975) were of the opinion that recording and transcription of grand jury proceedings should be required in every case. There was a split of opinion, however, as to the extent to which the transcript should be available to the accused.

[169] *See* note 158 *supra*.

[170] *See, e.g.*, United States v. Proctor & Gamble Co., 356 U.S. 677, 681-82 (1958); Note, *Disclosure of Grand Jury Minutes to Challenge Indictments and Impeach Witnesses in Federal Criminal Cases*, 111 U. PA. L. REV. 1154 (1963).

[171] FED. R. CRIM. P. 6(e). The ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 340.5 (Proposed Official Draft, 1975) requires dismissal of the indictment when the evidence before the grand jury is insufficient to establish probable cause. This does not reflect the majority view. The code also would provide the accused a preliminary hearing even after indictment. *Id.* § 330.1.

[172] FED. R. CRIM. P. 16(a)(1)(A).

supervision by the courts is needed if the fourth amendment is to have meaning.

VII. CONCLUSION

The problems stated above demonstrate serious and unresolved fourth amendment issues. The grand jury is free to indict on less evidence than that which would support a probable cause decision by a magistrate; and, as a result of the return of the indictment, the accused may be detained in custody or arrested. When the return of an indictment results in the issuance of an arrest warrant and evidence is seized incidental to the arrest, the defendant is wholly without legal remedy. Had the evidence been seized by any other process without a showing of probable cause, it would be subject to suppression at trial because of the violation of constitutional rights. The grand jury is the only agency in the criminal process empowered to violate fourth amendment rights with impunity. Even if it be assumed that most prosecutors and grand juries strive for fairness during the indictment process, in a very real sense they are joined together in the "competitive enterprise" of law enforcement. It is not enough merely to impose an ethical obligation not to indict without probable cause.[173] Quite apart from ethics, even when the prosecutor and grand jury are acting in good faith there is presently nothing in the law which tells them to refuse to indict when the evidence fails to establish probable cause in the fourth amendment sense. Since grand juries may hear as many as ninety cases in one day, often hearing only brief hearsay evidence of a police officer,[174] it is safe to assume that many indictments are based upon evidence that would not support the issuance of a warrant by a magistrate. Yet the consequences are the same: the accused is arrested or detained in custody by reason of the return of the indictment.

Apart from fourth amendment problems, the potential for abuse in the grand jury system is enormous. The process may be abused in many ways other than unjustified criminal charges or failures to charge when justified.[175] It can be used to collect evidence for pending

[173] *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY D.R. No. 7-103, which imposes a duty on the prosecutor not to institute, or cause to be instituted, criminal charges "when he knows, or it is obvious that the charges are not supported by probable cause." *See also* ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION § 3.6 (Approved Draft, 1971).

[174] *See* Bray, *supra* note 90.

[175] For an analysis of five cases (including the Kent State killings) in which there was substantial evidence meriting public prosecution but grand juries returned "no bills," see Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?*, 2 N.M. L. REV. 141 (1972).

civil or criminal cases, to collect intelligence data, to coerce perjury or contempt, or to harass.[176] The process can also be used to protect police from civil liability for false arrest since the return of an indictment is "conclusive" as to probable cause. It is unnecessary and inconsistent with basic constitutional values to add fourth amendment violations to the list.[177]

Since the fourth amendment gives concrete expression to a right of the people that is basic to a free society,[178] it must prevail over the most accepted customs and traditions. We should not continue to accept the grand jury as a substitute for a neutral and detached magistrate. Police and prosecutors should not be allowed to accomplish a result through the grand jury that could not be achieved by any other process. The contrary result "can serve only to encourage prosecutorial exploitation of the grand jury process, at the expense of both individual liberty and the traditional neutrality of the grand jury."[179]

To fashion the grand jury into an acceptable substitute for a fourth amendment magistrate would require major modification of the grand jury system. At a minimum it would involve complete restructuring of the jury's relationship with the prosecutor with independent legal counsel and investigatory resources. It might also require a substantial training period for jurors and a new set of evidentiary rules for hearing cases. A record would have to be made and provided to the defense in every case for meaningful review on a motion to suppress. Grand jury secrecy would be eliminated.

A more practical solution is to acknowledge that the grand jury is not suited for the tasks of a magistrate. The rule of *Pugh* should be extended to cases of grand jury indictment as well as prosecutions by information. In this way, a probable cause determination by a magistrate would be interposed between the grand jury and the accused at little cost to the system, just as *Pugh* requires the interposition of a magistrate between the accused and a prosecutor's informa-

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[176] *See* NATIONAL LAWYERS GUILD, REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES ch. 9 (1974).

[177] A defendant arrested by reason of grand jury indictment rather than a magistrate's warrant may have an equal protection defense. *Cf.* Alexander and Portman, *Grand Jury Indictment Versus Prosecution by Information—An Equal Protection-Due Process Issue*, 25 HASTINGS L.J. 997 (1974), which argues that it is a denial of equal protection to afford an adversarial preliminary hearing to a defendant charged by information but to deny it to one charged by indictment.

[178] *See* Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

[179] United States v. Dionisio, 410 U.S. 1, 47 (1973) (Marshall, J., dissenting).

tion.[180] Fourth amendment values would be preserved with little or no change in grand jury procedure. To extend *Pugh* to prosecutions by indictment would not frustrate or significantly impair the interests served by the grand jury process. There is no competing public interest to justify a general exception to the requirements of the fourth amendment.[181]

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[180] While it might be preferable to provide an adversarial preliminary examination after indictment as proposed by the American Law Institute, ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.1 (Proposed Official Draft, 1975), the fourth amendment demands only an *ex parte* probable cause determination by a neutral and detached magistrate.

[181] *Cf.* Camara v. Municipal Court, 387 U.S. 523, 533 (1967) (public interest in fire, health, and housing code inspections does not justify warrantless search).